Supreme Court, U.S.
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No. 96-1055

In The

Supreme Court of the United States

October Term, 1966

PARAGON PROPERTIES COMPANY,

Petitioner,

vs.

CITY OF NOVI,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Michigan

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Petitioner's taking claim, under any theory, was ripe for judicial review when Petitioner failed to obtain a final decision as to the use of its property from the Respondent?

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OPINIONS BELOW

The Michigan Supreme Court decision in this matter is reported at *Paragon Properties Co. v. City of Novi*, 452 Mich. 568, 550 N.W. 2d 772 (1996). The Order Denying Rehearing in the Michigan Supreme Court is found at 453 Mich. 1215, 554 N.W. 2d 900 (1996). The Michigan Court of Appeals' decision is reported at 206 Mich. App. 74, 520 N.W. 2d 344 (1994).

STATEMENT OF JURISDICTION

Respondent agrees with the Statement of Jurisdiction set forth in Petitioner's Petition for Writ of Certiorari.

ORDINANCE INVOLVED

In addition to the constitutional and statutory provisions cited by the Petitioner, Respondent asserts the City of Novi Zoning Ordinance § 3104 is also involved in this case which provides in pertinent part:

> 1. The Zoning Board of Appeals shall not have the power to alter or change the zoning district classification of any property, nor to make any change in the terms of this Ordinance but shall have the power to authorize a use in a zoning district in which it is not otherwise permitted, provided it is clearly shown that the land cannot be used for a zoned use, and shall be further empowered to act on those matters where this Ordinance provides for administrative review, interpretation, exception or special approval permit and to authorize a variance as defined in this Section and laws of the State of Michigan. Said powers include:

> b. **Variance.** To authorize, upon an appeal, a variance from the strict application of the provisions of this Ordinance whereby reason of exceptional narrowness, shallowness, shape or area of a specific piece of property at the time of enactment of this Ordinance or by reason of exceptional topographical conditions or other extraordinary or exceptional conditions of such property, the strict application of the regulations enacted would result in peculiar or exceptional practical difficulties to or exceptional undue hardship upon the owner of such property provided such relief may be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of this Ordinance. . . .

2. In consideration of all appeals and all proposed variations of this Ordinance, the Board shall before making any variations from the Ordinance in a specific case, first determine that the proposed variation will not impair an adequate supply of light and air to adjacent property, or unreasonably increase the congestion in public streets, or increase the danger of fire or endanger the public safety, or unreasonably diminish or impair established property values within the surrounding area, or in any other respect impair the public health, safety, comfort,

morals or welfare of the inhabitants of the City of Novi. . . .

STATEMENT OF THE CASE

A. Paragon Files Suit In Circuit Court

Petitioner, Paragon Properties Company (Paragon), filed a Complaint in the Oakland County Circuit Court, State of Michigan, on June 5, 1989 against Respondent, the City of Novi (City), alleging a taking of its property in violation of the United States and Michigan Constitutions seeking equitable relief and money damages. (Petitioner's App. D-4, D-7). On May 21, 1984, Paragon requested the City to rezone property owned by the Petitioner. Paragon owns approximately 75 acres located on the westerly boundary of the City at the intersection of Napier and Twelve Mile Roads. The current zoning at that time was R-1 and R-A wherein among other uses, the property was designated for single family residential use. Petitioner requested a rezoning to M-H so it could develop a mobile home park on said property.

To support its talking claim Paragon alleged the property had no economic potential for development under the current zoning. Paragon purchased the property in 1980, knowing the property was zoned for single family residential use, but hoped to obtain a rezoning of the property. In August, 1984 the City Council denied Paragon's rezoning request. As a result, Paragon filed an action in the Oakland County Circuit Court, State of Michigan against the City on January 11, 1985, case no. 85-288614 AZ. That case was ultimately dismissed without prejudice on February 9, 1989, and was refiled by Paragon on June 5, 1989. At page 3 of Paragon's Petition, Paragon states the suit was dismissed because the parties were engaged in further discussions to rezone the property. The availability of a

use variance was never discussed between representatives of Paragon and the City. While that is true, the City was under no affirmative obligation to suggest such a possibility.

Essentially, Paragon claimed the property, in a rural part of Novi, could not be economically developed, as zoned, because it was not served by a public sewer system; and allegedly the soil did not perk to allow the installation of septic fields to develop the property as zoned. Paragon alleged that all reasonable use of the land had been precluded. Paragon alleged that "As applied to the Property of Plaintiff, the zoning ordinance of the City of Novi is unreasonable, confiscatory, discriminatory, and it is unconstitutional and has deprived Plaintiff of its property in violation of the Due Process Clause of the Constitution of the State of Michigan and the United States of America". (Petitioner's App. D-7).

On June 21, 1989, an Answer and Affirmative Defenses were filed by the City. In the Affirmative Defenses the City asserted Paragon had failed to state a claim upon which relief could be granted for a deprivation of Paragon's constitutional rights. The City asserted that Paragon's taking claim under the Fifth and Fourteenth Amendments of the United States Constitution failed to state a claim when the State provided an adequate remedy at law. Further, the City asserted Paragon had received substantive due process as well as procedural due process with respect to its rezoning request. The City asserted no taking had occurred because the actions of the City were proper and constitutional. Lastly, the City reserved the right to raise any other affirmative defenses which became known to it throughout the course of discovery of these proceedings. Thereafter, the parties engaged in various discovery proceedings.

B. Circuit Court Denies The City's Motion For Partial Summary Judgment

On February 19, 1990, the City filed a Motion for Partial Summary Disposition asserting Paragon's taking claims, under the United States and Michigan Constitutions were not ripe for judicial review because a final decision regarding its use of the property had not been obtained from the City. The basis for said Motion, among other things, was, at the time, a recently released decision by the Michigan Supreme Court, *Electro-Tech v. Campbell Co.*, 433 Mich. 57, 445 N.W. 2d 61 (1989); embracing *Williamson County Regional Planning Comm. v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108, 878 L. Ed. 2d 126 (1985).

In the Answer to the City's Motion filed by Paragon, Paragon claimed the City was barred pursuant to M.C.R. 2.111(F)(3), to assert the defense raised in the City's Motion. Paragon asserted the City's argument was an affirmative defense which had to be stated in a party's first responsive pleading. Paragon asserted the denial of its application for rezoning constituted a final decision from which Paragon was entitled to seek damages.

On March 28, 1990, the parties appeared before the Oakland County Circuit Court to present argument on the City's Motion. At the conclusion of said hearing, the Court agreed with Paragon finding the defense raised in the City's Motion was untimely; and, Paragon had received a final decision from the City. Further, Paragon was not required to apply for a variance with the City's zoning board of appeals. An Order Denying Defendant's Motion for Partial Summary Disposition was entered by the Oakland County Circuit Court on April 6, 1990. As a result, the City filed an Application for Leave to Appeal with the Michigan Court of Appeals. The Court of Appeals denied the City's Application for Leave to Appeal on May 25, 1990.

While the Application was pending, the City filed a Motion for Leave to File Amended Affirmative Defenses in the Circuit Court. On March 29, 1990, Paragon opposed the Motion. Oral argument on said Motion was held on June 20, 1990. At the conclusion, the Circuit Court granted the City the right to file amended affirmative defenses. An Order Granting Leave to the City to Amend its Affirmative Defenses was entered by the Oakland County Circuit Court on July 3, 1990.

C. Circuit Court Issues Judgment Declaring Zoning Ordinance As Applied To Paragon's Property Is An Unconstitutional Taking

On July 5, 1990, the parties appeared in the Oakland County Circuit Court for the purpose of a bench trial that lasted seven days. At the conclusion of said trial, the court set forth its opinion on July 17, 1990.

The court found Paragon had satisfied the burden of establishing the property would not perk; and therefore would not support any of the City's alternative suggestions, or proposals regarding the development of said property as zoned. The court held Paragon had been deprived of all use of the property. The court further stated the property had no value, other than its original purchase price, $2,000 per acre, as presently zoned. Therefore, the zoning was confiscatory. The court declared the zoning ordinance, *as it applied to the land in question*, to be unconstitutional, contrary to the City's master plan; and enjoined the City from enforcing the existing zoning classification to the subject property.

The court maintained continuing jurisdiction to allow Paragon to proceed with the development of its property as a mobile home park. It was further ordered said development could not conflict with the state wetlands or woodlands statutes. As

to damages, the court found the City had taken 35 acres of the 75 acres in question through its zoning.

On August 30, 1990, a Judgment was entered by the Oakland County Circuit Court, for the State of Michigan conforming with the Court's ruling on July 17, 1990. In said Judgment, the amount of damages totaled $198,930. Further, the City was ordered to pay Paragon's actual and reasonable attorney fees to be submitted to the court at a later date.

The City filed a timely Motion for Judgment Notwithstanding the Verdict/New Trial raising various arguments including the finality/ripeness doctrine. Paragon opposed the Motion. The court denied the City's Motion for Judgment Notwithstanding the Verdict/New Trial by an Order dated December 17, 1990. The City filed an appeal in the Michigan Court of Appeals and the Petitioner cross-appealed on several grounds.

D. Michigan Court Of Appeals Reverses Judgment On Ripeness Grounds

On April 7, 1994, the Michigan Court of Appeals issued its Opinion reversing the Oakland County Circuit Court Judgment entered against the City on August 30, 1990. In so doing the Court of Appeals stated:

> The dispositive issue is whether Novi's denial of Paragon's rezoning application constituted a final determination from which Paragon could seek redress in the circuit court. Of course, Paragon contends that Novi's denial was a final determination; Novi argues that Paragon was obliged to seek a zoning variance from the zoning board of appeals

and to bring a state inverse condemnation action before its constitutional claim was ripe. We agree with Novi.

Under Michigan law, the doctrine of finality requires a property owner to obtain a final decision from the governmental entity alleged to have unconstitutionally taken the property and also attempt to obtain just compensation through inverse condemnation. The purpose of the finality requirement is to ensure that there actually was a taking. *Electro-Tech, Inc. v. H. F. Campbell Co.*, 433 Mich. 57, 61; 445 N.W.2d 61 (1989), cert. den. 493 U.S. 1021 (1990); *Lake Angelo Associates v. White Lake Twp.*, 198 Mich. App. 65; 498 N.W. 2d 1 (1993).

We also reject Paragon's contention that Novi waived the defense of finality because it failed to raise it as an affirmative defense in its first responsive pleading. *Finality goes to subject matter jurisdiction and thus need not be listed as an affirmative defense. Pearson v Grand Blanc*, 961 F.2d 1211, 1214-1215 (CA 6, 1992); *Campbell v St. John Hosp.*, 434 Mich. 608, 616; 455 N.W.2d 695 (1990); *Grand Blanc Landfill, Inc. v. Swanson Environmental, Inc.*, 200 Mich. App. 642, 646; 505 N.W.2d 46 (1993), lv. pdg.

Finally, Paragon attempts to overcome the finality requirement by arguing that it would have been futile, as well as a measure taken in bad faith, to have sought a variance from

> the Zoning Board of Appeals. We disagree in light of the exceptional hardship exception that affords the Zoning Board of Appeals the opportunity to grant the variance regardless of Paragon's ability to otherwise qualify.
>
> Because we reverse the judgment on finality grounds, we do not reach or consider the other issues raised in this case by Novi in its direct appeal or Paragon in its cross-appeal.

(Emphasis added). *Paragon Properties Co. v. City of Novi*, 206 Mich. App. 74, 520 N.W. 2d 344 (1994).

Petitioner filed a Motion for Rehearing on April 28, 1994. The Michigan Court of Appeals denied the Motion on June 10, 1994.

E. Michigan Supreme Court Affirms The Michigan Court Of Appeals On Ripeness Grounds

Paragon filed an Application for Leave to Appeal with the Michigan Supreme Court, which was originally denied. However, on September 20, 1995, the Michigan Supreme Court granted Paragon's subsequent Motion for Reconsideration and granted leave to appeal at *Paragon Properties Co. v. City of Novi*, 450 Mich. 865, 550 N.W. 2d 772 (1995).

In the appeal before the Michigan Supreme Court, Paragon raised many arguments all of which essentially asserted the Michigan Court of Appeals erroneously applied the Michigan Supreme Court decision in *Electro-Tech, supra*. Paragon argued the City's zoning board of appeals had no authority to grant Paragon a use variance. Paragon argued the City Council had exclusive decision-making power relative to zoning matters, and

to allow the Zoning Board of Appeals to grant a use variance would in effect be a usurpation of the City Council's legislative function. Further, Paragon argued seeking a use variance would be futile when it would not qualify for one. Lastly, Paragon argued the finality/ripeness doctrine only applied to a just compensation taking claim. Paragon asserted the finality/ ripeness doctrine did not apply to taking claims based on an as applied substantive due process challenge under the Fourteenth Amendment.

Paragon argues at page 10 of its Petition the Michigan Supreme Court "opined that, although Paragon secured an unconditional denial of its rezoning request . . . Paragon should have sought a use variance from the Zoning Board of Appeals." The Michigan Supreme Court never stated Paragon had received an unconditional denial of its rezoning request. Instead, the Supreme Court stated "[W]hile the city council's denial of rezoning was certainly a decision, it is not a final decision under *Electro-Tech* because had Paragon petitioned for a land use variance, Paragon might have been eligible for alternative relief from the provisions of the Ordinance." (Petitioner's App., A-11).

REASONS FOR DENYING THE WRIT

As the Petitioner correctly states, an indispensable element of subject matter jurisdiction in federal court is the existence of a case or controversy. U.S. Const. art. III. Further, to effectuate a limitation on the judiciary over local land use regulations, in which a property owner claims a regulatory taking, this Court has adopted the finality/ripeness doctrine in *Williamson County, supra*. The Williamson finality doctrine was adopted by the Michigan Supreme Court in *Eletro-Tech, supra*. The Petitioner fails to remember that the courts, whether federal or state, can not invade the province of local government in its land use

regulations unless the regulations are clearly prohibited by law or constitution. Hence, the finality/ripeness doctrine recognizes that both federal and state courts must guard against violating the separation of powers doctrine and invade the province of local governments in regulating land usage within their boundaries. Zoning ordinances, combined with other mechanisms such as land use variances, enable local governments to more adeptly manage land within their jurisdictions. The zoning of land is a reasonable exercise of governmental police power and must be accomplished at the local level. The finality/ripeness doctrine allows this end to be accomplished without unnecessary interference by the judiciary.

The Petitioner asserts lower federal courts have struggled to apply the finality/ripeness doctrine in a consistent fashion. Further, the Petitioner asserts there has been confusion over the purpose and scope of the doctrine in the federal courts. Finally, Petitioner asserts this Court has recently granted a writ of certiorari in *Suitum v. Tahoe Regional Planning Agency*, 80 F.3d 359 (9th Cir. 1996), *cert. granted,* 117 S. Ct. 293 (1996).

Although this Court has granted certiorari in *Suitum, supra*, the granting of certiorari does not mean this Court did so because it recognizes the need to clarify the manner in which *Williamson County* is applied by federal courts. The *Suitum* case has been involved in extensive litigation over a number of years involving unique facts and issues. Facts and issues not present in the instant matter. Specifically, the question of whether a property owner must transfer their "development rights" in a unique land use program, before an as applied taking claim is ripe for judicial review. Those issues are not present in this case. Further, there has been no confusion or conflict among the courts as to the purpose and/or scope of the doctrine. There is no need to clarify the manner in which *Williamson County* is applied by "federal courts" as the action involved in this case concerns a decision

of the Michigan Supreme Court, a decision which is consistent with this Court's decision in *Williamson County*. There is absolutely no conflict or confusion over the application of the *Williamson County* finality/ripeness doctrine, by lower federal courts, or the State of Michigan, which should induce this Court to grant certiorari in the instant matter.

I.

THE *WILLIAMSON COUNTY* RIPENESS DOCTRINE DOES NOT NEED CLARIFICATION AS THERE IS NO CONFLICT BETWEEN THE DECISION OF THE MICHIGAN SUPREME COURT AND DECISIONS OF THE SIXTH AND ELEVENTH CIRCUIT COURT OF APPEALS.

A. The Michigan Supreme Court Did Not Expand The *Williamson County* Ripeness Doctrine Contrary To The Decisions Of The Sixth And Eleventh Circuit Court Of Appeals.

At page 13 of Paragon's Petition, Paragon asserts the Michigan Supreme Court dismissed all of its constitutional claims, "including Paragon's non-taking substantive due process claim under the Fourteenth Amendment". To support this argument Paragon asserts the *Williamson County* decision rendered by this Court does not apply to non-taking substantive due process claims. Paragon's analysis of this Court's decision in *Williamson* is erroneous. In *Williamson*, this Court specifically stated:

> We turn to an analysis of respondent's claim under the due process theory that petitioners espouse. As noted, under that theory government regulation does not effect a

taking for which the Fifth Amendment requires just compensation; instead, regulation that goes so far that it has the same affect as a taking by eminent domain is an invalid exercise of the police power, violative of the Due Process Clause of the Fourteenth Amendment.

* * *

We need not pass upon the merits of petitioners' arguments, for even if viewed as a question of due process, respondent's claim is premature. Viewing a regulation that "goes too far" as an invalid exercise of the police power, rather than as a "taking" for which just compensation must be paid, does not resolve the difficult problem of how to define "too far," that is, how to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession. As we have noted, resolution of that question depends in significant part, upon an analysis of the effect the Commission's application of the zoning ordinance and subdivision regulations had on the value of respondent's property and investment-backed profit expectations. That effect cannot be measured until a final decision is made as to how the regulations will be applied to respondent's property. *No such decision had been made at the time respondent filed its §1983 action, because respondent failed to apply for variances from the regulations.*

> *In sum, respondent's claim is premature, whether it is analyzed as a deprivation of property without due process under the Fourteenth Amendment, or as a taking under the Just Compensation Clause of the Fifth Amendment.*

(Footnotes omitted). (Emphasis added). *Williamson*, 473 U.S. at 197,199, 200; 105 S. Ct. at 3122, 3123, 3124.

Thus, it is clear the finality/ripeness doctrine applies to taking claims under a just compensation and an as applied substantive due process claim.

At pages 15-16 of the Petition filed by Paragon, Paragon asserts the Sixth Circuit Court of Appeals held the very existence of an allegedly unlawful zoning action without more makes a substantive due process claim ripe for federal adjudication citing *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1215 (6th Cir. 1992). Paragon's analysis of the decision set forth in *Pearson, supra* is erroneous. The *Pearson* panel did not state that the very existence of an allegedly unlawful zoning ordinance, without more makes a substantive due process claim ripe for review. Instead, the *Pearson* panel noted that a prior panel of that court had recently held the existence of an allegedly unlawful zoning action, without more, makes a substantive due process claim ripe for federal adjudication; citing *Nasierowski Bros. Inv. Co. v. City of Sterling Heights*, 949 F.2d 890, 894 (6th Cir. 1991). However, *Nasieroswki was a procedural due process* case.

In *Pearson* the court noted there are six type of federal zoning claims. *Pearson* listed those claims as: (1) just compensation taking claims; (2) due process taking claims; (3) arbitrary and capricious substantive due process claims; (4) equal protection; (5) procedural due process; and (6) First Amendment.

While it is true the Sixth Circuit Court of Appeals found *Pearson*'s as applied substantive due process claim to be ripe for judicial review, the court did so because the plaintiff in *Pearson* had met the strict ripeness standard enunciated by the Ninth Circuit Court of Appeals. The *Pearson* plaintiff had submitted an application for an alternative use. *Pearson* stated the Ninth Circuit has a strict ripeness requirement in non-taking zoning cases; which requires the landowner to not only submit one meaningful application, but also seek at least one variance, if that application is denied, before coming to federal court. *Harrington v. County of Sonoma*, 834 F.2d 1488, 1494-95 (9th Cir. 1987), *modified*, 857 F.2d 567, 569 (9th Cir. 1988). In the instant matter, Paragon merely requested a rezoning. It did not submit any site plan or seek a variance and was therefore premature in filing an as applied substantive due process challenge against the City. Finally, the Sixth Circuit said it was following the precedent set forth in *Nasierowski, supra*.

In *Nasierowski, supra*; the plaintiffs *made a procedural due process challenge* when the defendant city gave a conditional approval of a site plan requiring the plaintiff to improve public roads accessing the plaintiffs' proposed development. The *Nasierowski* plaintiffs *also applied for a variance from the requirements imposed on the site plan which was denied.* While the plaintiffs in *Nasierowski* were engaged in seeking a variance, the city council adopted a new city-wide master zoning plan which rezoned the plaintiffs' property placing greater restrictions on the plaintiffs' proposed development. The plaintiffs were at the point of obtaining final site plan approval, when the proposed new master plan was modified and a new zoning classification was applied to the plaintiffs' property, which would prohibit the plaintiffs from developing the property as planned. Without applying to the city's board of zoning appeals for a variance from the newly enacted zoning classification, Nasierowski commenced suit in federal district court. On appeal to the Sixth

Circuit, Nasierowski argued he was denied procedural due process when the city's master zoning plan was amended without providing him with notice and opportunity to be heard regarding the change.

In *Nasierowski*, the Sixth Circuit held the *Williamson* finality doctrine does not apply to procedural due process claims, because the injuries to the property owner accrue and attach immediately when the property owner has been denied notice and an opportunity to be heard; *i.e.*, procedural due process. Thus, the situation and claims presented in *Nasierowski* are clearly distinguishable from the instant matter. Further, the *Pearson* panel was mistaken when it found that *Nasierowski* stood for the proposition that the very existence of an allegedly unlawful zoning action, without more, makes a substantive due process claim ripe for adjudication. *Nasierowski* does not state that.

Paragon relies on the decision in *Eide v. Sarasota County*, 908 F.2d 716 (11th Cir. 1990); claiming the Eleventh Circuit Court of Appeals has held the *Williamson* finality doctrine does not apply to an as-applied substantive due process challenges. Further, Paragon asserts there is a conflict between the decision in this case and the *Eide* case.

A careful review of the *Eide* decision reveals the Eleventh Circuit Court failed to follow its own precedent set in *Greenbriar Ltd. v. City of Alabaster*, 881 F.2d 1570 (11th Cir. 1989). Further, the opinion itself is not applicable here when Paragon has never alleged a "*non-taking*" substantive due process claim. A careful review of Paragon's Complaint and the appellate briefs filed by the parties reveals Paragon has consistently claimed a taking of its property occurred entitling it to money damages when the City denied Paragon's rezoning request.

Utilizing the *Eide* reasoning in this case the remedy sought by Paragon evidences Paragon has consistently argued a taking of its property under the Fifth and Fourteenth Amendments seeking compensation; and, the ability to develop its property as a mobile home park. The property has never been developed because Paragon has been unable to obtain the necessary permits from the State of Michigan, even though the City had been enjoined from enforcing its ordinance until the Michigan Supreme Court denied Paragon's Motion for Reconsideration, October 7, 1996.

An as-applied substantive due process challenge claiming the governmental entity acted in an arbitrary and capricious manner essentially asserts there was no basis for denying the Petitioner's rezoning request. Yet, the reasons for the denial of the Petitioner's rezoning request were never explored or developed at the trial court level. Without exploring those reasons how could Paragon argue the decision not to rezone the property was arbitrary and capricious. Paragon essentially argued the decision to deny its rezoning request precluded Paragon from using its property. In other words, Paragon could not economically develop the property as zoned. Clearly, this allegation is a taking allegation and not merely a statement that the City was acting arbitrarily and capriciously.

The decision of the Michigan Supreme Court in this case is not in conflict with the decision of the Sixth Circuit Court of Appeals in *Pearson*. To the extent that the Michigan Supreme Court decision conflicts with that rendered in *Eide, supra*; Respondent asserts the decision in *Eide* is at best very confusing and should not be the basis for granting the Petition for Writ of Certiorari in this case.

In *Taylor Inv. Ltd. v. Upper Darby Twp.*, 983 F.2d 1285 (3rd Cir. 1993), *cert. denied,* 114 S. Ct. 304; 126 L. Ed. 2d 252 (1993),

the Third Circuit Court of Appeals held the *Williamson* finality doctrine applies to an as-applied substantive due process challenge to a land use regulation. In so holding, the court noted that to prevail on a substantive due process claim a plaintiff must have been deprived of a property interest because of arbitrary and capricious government action. Again, *Taylor* points out that the finality requirement for such a challenge is necessary to determine what property interest, and to what extent that property interest, has been taken. Paragon never asserted a "non-taking" substantive due process claim in this case.

B. The Michigan Supreme Court Decision In This Case Does Not Deprive Paragon Of A Right To Temporary Taking Damages, Contrary To The Fifth Amendment As Applied By This Court In *First English Evangelical Lutheran Church*.

In subsection A. of Paragon's Petition it claims it made a "non-taking" substantive due process argument that should not be subject to the *Williamson* finality doctrine. Yet, at subsection B. of its Petition it now claims the Michigan Supreme Court in this case deprived Paragon of its right to seek temporary taking damages contrary to the Fifth Amendment and this Court's holding in *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987).

Paragon argues the Michigan Supreme Court decision in this case results in a situation where any person whose property cannot be developed under the existing zoning must first pursue a myriad of administrative appeals, including a variance application to a zoning board of appeals, and then an appeal to the Circuit Court. Further, Paragon asserts that neither the zoning board of appeals, nor a circuit court on appeal from a decision of the zoning board of appeals, has the authority to award damages under the Just Compensation Clause of the Fifth

Amendment, therefore it could never seek money damages for a temporary taking. What Paragon fails to remember is, although it would have had the right to appeal the zoning board of appeals' denial of a variance, by seeking a variance and having same be denied, at least Paragon would have received a final decision as to how its property could be used. Once that occurred its taking claim, temporary or otherwise, would be ripe for judicial review. Contrary to the assertions of Paragon the decision of the Michigan Supreme Court in this case in no way prevents property owners from seeking just compensation for temporary takings of their property.

The decision of the Michigan Supreme Court does not conflict with this Court's holding in *First English Evangelical Lutheran Church of Glendale.* In *First English, supra*, this Court found the plaintiff's claim was ripe for judicial review because the plaintiff had met the requirement that a state inverse condemnation action be filed. The second prong of the *Williamson* finality doctrine; *i.e.*, had the plaintiff received a final decision as to the use of its property was not at issue. In fact, all of the courts assumed *all* use of the plaintiff's property had been precluded by the land use regulation. In this case there was no such assumption. Again, Paragon fails to remember the basic premise behind the awarding of just compensation. That is, a property owner is entitled to just compensation for a temporary or permanent taking of *all use* of the property. In this case, the use of the Petitioner's property was never determined.

II.

THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED IN THIS CASE AS THE OHIO OPINION RELIED UPON BY THE PETITIONER IS DISTINGUISHABLE FROM THE INSTANT MATTER; THEREFORE THERE IS NO CONFLICT AMONG STATE COURTS REGARDING THE *WILLIAMSON* FINALITY DOCTRINE.

Paragon argues the Supreme Court of Ohio in *Karches v. City of Cincinnati*, 38 Ohio St. 3d 12, 526 N.E. 2d 1350 (1988) specifically rejected the *Williamson* finality doctrine on identical facts. First and foremost it should be noted this statement is completely untrue. The facts in *Karches* are completely distinguishable from the instant matter.

First, the property owned by the plaintiffs in *Karches* had been used by the plaintiffs for approximately six years, when the city adopted a new city-wide zoning proposal which changed the zoning classification of the plaintiffs' properties. Three years later, one of the plaintiffs discovered the zoning change and explored the possibility of having his property rezoned. However, no action or request for rezoning was taken by the plaintiff until eight years later, which was denied. Thereafter, the plaintiffs attempted to use their land for a permitted use under the city's zoning ordinance. Seventeen years after the initial change in zoning, the plaintiffs filed suit against the city alleging the zoning ordinance was an as applied unconstitutional taking of their property requiring just compensation. However, the plaintiffs dismissed the lawsuit without prejudice when the city assured the plaintiffs their problems with the use of their property would be settled by revisions to the zoning ordinance. The revisions did not help the plaintiffs and a second suit was filed against the city.

The Court of Appeals in *Karches, supra*, held the city had not reached a final definitive position because the plaintiffs had not, *on the basis of a specific proposed use,* petitioned for a rezoning or applied for a building permit. Without a refusal by the city to allow a specific use, the Court of Appeals for Ohio found no definitive position as to the use of the property had been taken by the city. The Ohio Supreme Court disagreed with the Court of Appeals. The Ohio Supreme Court found the denial of a specific proposed use was not necessary to find that the city had taken a final definitive position on the use of the property to satisfy the ripeness test. In so holding, the Supreme Court of Ohio specifically recognized that pursuant to the *state law* of Ohio the constitutionality of a zoning ordinance may be attacked in two ways. Further, pursuant to state statute the ripeness determination is not applicable to an action for declaratory judgment. Finally, and most importantly, *Ohio law precluded the granting of a variance for a use contrary to the use regulations of the applicable zoning district.* A situation, that is not present in this case under Michigan law.

Thus, a careful review of the decision in this matter in comparison to the Ohio case clearly reveals the two are not the same. There is no conflict requiring this Court to expend its time and energy and grant the Petitioner's Petition for Writ of Certiorari in this case.

CONCLUSION

Paragon Properties Company never received a final definitive decision regarding the use of its property from the Respondent, the City of Novi. Pursuant to this Court's decision in *Williamson*, Paragon's taking claim under any theory was not ripe for judicial review. Paragon's allegation that it asserted a "non-taking" substantive due process claim is meritless. That claim was never made in the courts below. Paragon never

developed that theory; and, the remedy Paragon sought clearly establishes Paragon attempted to assert a taking claim against the City of Novi.

The Michigan Supreme Court did not expand the *Williamson County* finality doctrine beyond its intended scope; nor has it deprived Michigan landowners of constitutionally protected property rights by its decision in this case.

Finally, the granting of a Writ of Certiorari in the case of *Suitum v. Tahoe Regional Planning Agency*, 80 F.3d 359 (9th Cir. 1996), *cert. granted*, 117 S. Ct. 293 (1996), does not establish this Court has "already recognized the significant need to resolve the uncertainty and inconsistent application of *Williamson County*". The decision in this matter is consistent with other decisions involving the issues at hand both at the federal and state court levels.

The City of Novi respectfully prays this Court deny Paragon's Petition for Writ of Certiorari. Alternatively, the City of Novi prays this Court will summarily affirm the decision of the Michigan Supreme Court.

Respectfully submitted,

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